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IN THE SUPREME COURT OF THE UNITED STATES

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BE&K CONSTRUCTION COMPANY, :  
Petitioner :  
v. : No. 01-518  
NATIONAL LABOR RELATIONS :  
BOARD, ET AL. :  
- - - - -X

Washington, D.C.

Tuesday, April 16, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

MAURICE BASKIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 01-518, the BE&K Construction Company v. the  
5 National Labor Relations Board.

6 Mr. Baskin.

7 ORAL ARGUMENT OF MAURICE BASKIN

8 ON BEHALF OF THE PETITIONER

9 MR. BASKIN: Mr. Chief Justice, and may it  
10 please the Court:

11 This case presents an important question arising  
12 under the Petition Clause of the First Amendment.

13 Petitioner BE&K Construction is asking the Court to hold  
14 that the First Amendment protects objectively based  
15 lawsuits from being declared unlawful by the National  
16 Labor Relations Board.

17 Now, the Court has already held that the First  
18 Amendment does protect lawsuits from statutory sanction  
19 under both the NLRA and the antitrust laws so long as the  
20 suits are meritorious, meaning that they are not  
21 objectively baseless. In the Bill Johnson's case, the  
22 Court said -- and I quote -- it is not unlawful to pursue  
23 a meritorious lawsuit under the National Labor Relations  
24 Act. In fact, the Court said it twice and specifically  
25 cited the Noerr-Pennington doctrine of the antitrust law.

1 Then it --

2 QUESTION: How do you describe the test applied  
3 by the board?

4 MR. BASKIN: Well, the test by the board is one  
5 which says that the employer must be -- must prevail, must  
6 be 100 percent prevailing in the lawsuit. As a standard  
7 that's impossible for any employer to anticipate in  
8 advance. No -- no employer can ever be 100 percent sure  
9 of prevailing.

10 QUESTION: Should there be any other component?  
11 I mean, I think your client lost basically. So --

12 MR. BASKIN: Well, the question is what was --

13 QUESTION: What else should be part of the test?

14 MR. BASKIN: The test is what is the -- was  
15 there an objective basis for the litigation. It's not a  
16 win-or-lose test, as the Court said in Professional Real  
17 Estate -- and I'll quote again -- it's got to be  
18 objectively baseless in the sense that no reasonable  
19 litigant could realistically expect success on the merits.

20 QUESTION: Well, should the test from  
21 Professional Real Estate automatically be carried over to  
22 the Labor Relations Act?

23 MR. BASKIN: Well, in this case, Your Honor, an  
24 answer is yes because the Court itself has interacted with  
25 the -- both of the acts. They cross reference with each

1 other. Bill Johnson's referred directly to the California  
2 Motor Transport. Professional Real Estate referred to  
3 Bill Johnson's as if it's one consistent whole. And it  
4 is.

5 QUESTION: Well, but I -- I wonder if -- if the  
6 National Labor Relations Board doesn't have some  
7 discretion to say that the labor situation is somewhat  
8 different, as they apparently do, from the antitrust  
9 situation.

10 MR. BASKIN: Well, but the irony here is that  
11 the NLRB has not -- has not interpreted its own statute.  
12 It's not being deferred to here. The NLRB is interpreting  
13 this Court's decision in Bill Johnson's.

14 QUESTION: Which happened to say precisely what  
15 the NLRB said it said.

16 MR. BASKIN: Well, no, Your Honor. In Bill --

17 QUESTION: If a judgment goes against the  
18 employer in the State court, if it goes against him, then  
19 he's had his day in court. And then the board may proceed  
20 to adjudicate the unfair practice claim, and then the  
21 employer's suit, having been proved unmeritorious, the  
22 board can take that fact into account when it decides the  
23 labor law violation.

24 MR. BASKIN: Three --

25 QUESTION: And you've been reading three cases

1 to us, so that seems to be the language that you have. I  
2 -- I read that as saying you lose. Period. End of the  
3 matter. That's what the board decides.

4 Now, I put that so you'll reply to it.

5 MR. BASKIN: Yes. Three things in the phrasing  
6 that you just said. First, the Court said the board may  
7 proceed, did not say it's an automatic result. Said may  
8 adjudicate the unfair labor practice, did not say it's an  
9 automatic result.

10 And then key phrase, having proved to be  
11 unmeritorious, what does unmeritorious mean? Well, this  
12 Court has consistently said what unmeritorious means. It  
13 said so before Bill Johnson's in the Christiansburg case.

14 QUESTION: Mr. Baskin, back up a bit.

15 MR. BASKIN: Yes.

16 QUESTION: The -- the Court in that very  
17 paragraph gave a definition of what it meant. So, I  
18 wouldn't look outside this document for what the Court  
19 meant by with merit/without merit when the -- look at the  
20 sentence in the middle of that paragraph. It says if the  
21 judgment goes against the employer and the State court.

22 MR. BASKIN: Yes.

23 QUESTION: Judgment against you. Or if his suit  
24 is withdrawn or is otherwise shown to be without merit.  
25 Otherwise shown to be merit. I took that to mean if you

1 lose, it's shown to be without merit. There may be other  
2 situations in which it's shown to be without merit. So,  
3 it seems to me the best place to find out what the Court  
4 meant merit/without merit is the very opinion that we're  
5 construing.

6 MR. BASKIN: Yes, and if it were the holding of  
7 the opinion, it would have greater weight. But this is  
8 not the holding that we're talking -- that we're parsing  
9 out here. This is dicta because the essential --

10 QUESTION: Well, there are two responses to the  
11 dicta point it seems to me. The first one is it was  
12 dicta, but it was dicta that preceded a remand in which  
13 this issue in fact would be explored. And the second  
14 response is the -- as I understand it, the board itself  
15 has followed the -- the dicta for -- I forget how many  
16 years now, but consistently followed it and Congress has  
17 done nothing about it. So, A, query whether it's dicta,  
18 and B, even if it is, isn't it the kind of dicta that at  
19 this point definitely should be followed?

20 MR. BASKIN: It is clearly dicta because the  
21 Court stated what was the issue before it, and the sole  
22 issue before it in Bill Johnson's is stated at the  
23 beginning of the opinion, whether the NLRB may issue a  
24 cease and desist order to halt the prosecution of a State  
25 court civil suit brought by an employer to retaliate

1 against employees.

2 And the holding of the case, which analyzes the  
3 First Amendment at great length, says that the right of  
4 access to the courts is too important to be an unfair  
5 labor practice. And it also defines meritorious as being  
6 reasonable basis, language in the Court's opinion.

7 QUESTION: I think there's another element that  
8 you're ignoring. I thought the board looked both at  
9 whether it was a meritless lawsuit against the unions and  
10 whether it was for a retaliatory purpose.

11 MR. BASKIN: Yes.

12 QUESTION: Isn't that the other element?

13 MR. BASKIN: Yes. Both elements must be  
14 present.

15 QUESTION: Okay. And how do we define  
16 retaliatory purpose? What -- what constitutes that --

17 MR. BASKIN: Well, it's --

18 QUESTION: -- do you think, in the board's rule?

19 MR. BASKIN: Yes. It's very -- pretty much the  
20 same as the improper motivation purpose test that was in  
21 the Professional Real Estate case, which also has the two-  
22 part test. You look at the objective basis first, and  
23 then and only then if there's no objective basis, you look  
24 at whether there was a retaliatory motive.

25 And how that's defined, although the Court did

1 not grant cert on that issue, we contested vigorously the  
2 -- the board's finding of retaliatory motivation here --  
3 because in fact the board has made it a rubber stamp.  
4 It's become automatic if the case relates in any way to  
5 union activity, the board finds that it's retaliatory  
6 motivation.

7 But the first part of the test is an objective  
8 one that the Court has spelled out both in Bill Johnson's  
9 itself and in Professional Real Estate. And to take any  
10 -- to take the board's standard puts employers in an  
11 impossible situation. It is unworkable. Going back to  
12 the question of dicta or not, you have ambiguous language  
13 at best because we have several different references to  
14 meritorious throughout the Bill Johnson's opinion.

15 QUESTION: May I just ask this, Mr. Baskin? Do  
16 you think there is a distinction between an ongoing case  
17 and a completed case?

18 MR. BASKIN: It's one mostly as to timing and  
19 facts available to the board, and I think that's what the  
20 Court was --

21 QUESTION: But the -- in your view, the standard  
22 is the same. It's not that the board tries to enjoin the  
23 proceeding as -- as opposed to later on bringing an unfair  
24 labor practice after it's over.

25 MR. BASKIN: The substantive standard should be

1 the same.

2 QUESTION: It should be, but --

3 MR. BASKIN: Should be.

4 QUESTION: -- do you think that Johnson says  
5 it's the same?

6 MR. BASKIN: We're all here today because the  
7 language in the tail end of the Bill Johnson's opinion is  
8 ambiguous as to what they intended the standard to be.

9 QUESTION: And at least it says there's a  
10 different standard.

11 MR. BASKIN: As to -- the -- the impact was --

12 QUESTION: And your view is there should be no  
13 different standard.

14 MR. BASKIN: Correct.

15 QUESTION: And that's the whole key to the case.

16 MR. BASKIN: That really is the whole key to the  
17 case.

18 QUESTION: And why not?

19 QUESTION: Mr. Baskin, is your -- is your  
20 argument -- in your opening remarks, you -- you referred  
21 only to the First Amendment. Is -- is it -- is it a  
22 constitutional argument you're making? To -- to agree  
23 with you here, do I have to agree that if Congress passed  
24 a law adopting the English rule on -- on attorney's fees,  
25 that would be unconstitutional?

1 MR. BASKIN: No. We are not saying that. We  
2 are not seeking to constitutionally -- we are asking no  
3 more than that you apply this standard to the two statutes  
4 you've already applied it --

5 QUESTION: Which says -- so, it's a statutory  
6 argument.

7 MR. BASKIN: No. It is a constitutional and  
8 statutory argument, which is what the Court itself said in  
9 both of these cases because there's a sanction involved.

10 QUESTION: I don't know what you mean by a -- is  
11 it -- does the Constitution prohibit it or not?

12 MR. BASKIN: It prohibits a statute from  
13 prohibiting it.

14 QUESTION: The Constitution prohibits. So, your  
15 answer to my question is --

16 MR. BASKIN: Constitutional and statutory.

17 QUESTION: You -- you cannot -- that Congress  
18 could not adopt the English rule.

19 MR. BASKIN: No. The difference -- here's the  
20 important difference.

21 QUESTION: It would do that by statute.

22 MR. BASKIN: But is there an -- a declaration of  
23 unlawfulness involved? There are many fee-shifting  
24 statutes. We're not taking issue with mere fee-shifting,  
25 but the National Labor Relations Board is saying that BE&K

1 broke the law, and that's what also happened under the  
2 antitrust laws. They're saying -- they're issuing a cease  
3 and desist order from filing so-called nonmeritorious  
4 litigation.

5 QUESTION: But the fact that it's triple damages  
6 is a little different than fee-shifting. So, one could  
7 easily say, when you're exposed to treble damages,  
8 putative damages, yes, that's a punishment. Here fee-  
9 shifting is the rule in most countries in the world.

10 So, what is the more here? I understand the  
11 more in antitrust cases, treble damages. Here you say,  
12 well, there's a finding that you have committed an unfair  
13 labor practice. What are the consequences in addition to  
14 that you have to pay the other side's legal fees? What  
15 are the adverse consequences --

16 MR. BASKIN: First, the most important is the  
17 declaration that you are a law violator in and of itself.  
18 You have to post a notice for your employees not only at  
19 this job site but all across the country. You have your  
20 -- your customers become aware of it. The unions  
21 certainly make sure your customers become aware of it.  
22 There's the serious danger of debarment either privately  
23 or by governmental action.

24 QUESTION: Explain that. You did say that in  
25 your brief about debarment, and I didn't -- I can

1 understand when you say someone -- someone's reputation is  
2 affected by being labeled a law violator. But you said  
3 something about -- about the jeopardy of debarment and I  
4 wasn't clear how that would work.

5 MR. BASKIN: It's not meant in the legal sense  
6 and the Government -- we're not -- we're not talking about  
7 whether the Government has to debar the company, but both  
8 private actors and many Government contracting officers  
9 take the view they don't want to deal with people who have  
10 been declared to be law violators. The goodwill and  
11 reputation of the company is at stake.

12 QUESTION: Well, in our lower case, the --  
13 Wisconsin set out to do that on a State basis, didn't it?  
14 If you violated the Labor Act, the State was not going to  
15 deal with you.

16 MR. BASKIN: Yes, they did. And then the  
17 Federal Government just last -- 2 years ago in the  
18 previous administration, had come through with a set of  
19 rules saying that companies would be debarred if they were  
20 found to have violated labor laws.

21 So, having this -- a declaration of illegality  
22 in place is what makes this different, Justice Scalia,  
23 from a random fee-shifting statute, and that's why we are  
24 not asking you to do anything other than what you've  
25 already done, which is to apply the First Amendment to two

1 statutes which you have determined have great commonality  
2 over the years, as each one keeps referring back to the  
3 other in this doctrine.

4 QUESTION: What do you do with the 2 decades  
5 that have elapsed -- about 2 decades -- since Justice  
6 White's opinion which has been interpreted by the board  
7 the way the language most naturally reads? The one thing  
8 is to say when the case first came out it was ambiguous.  
9 But now we have 2 decades of consistent interpretation of  
10 that language by the board.

11 MR. BASKIN: I regret to say it's a tribute to  
12 the speed of the board's processes and the process of  
13 getting this case up to this level on this issue because  
14 this case alone has taken 7 years to work its way through  
15 the board. When the litigation was begun in this case, it  
16 was 1987. The Bill Johnson's case was fresh. There was  
17 considerable doubt as exactly -- as to exactly what it  
18 meant. I should note that in the district court opinions  
19 that are part of the appendix, the unions raised Bill  
20 Johnson's and said that it -- they were protected under  
21 it, citing it interchangeably with Professional Real  
22 Estate.

23 QUESTION: They won over half their cases,  
24 didn't they?

25 MR. BASKIN: Excuse me?

1           QUESTION:  Didn't they win -- they won some 15  
2 out of their 29 cases.

3           MR. BASKIN:  Depending on how you count, they  
4 just barely got over 50 percent.

5           QUESTION:  Did you ask -- talking about the  
6 history of the case, could you tell me how did this case  
7 end up in the Sixth Circuit?

8           MR. BASKIN:  Well, in fact, by the time this  
9 case got to the court of appeals, BE&K was no longer doing  
10 business in California.  The gravamen of its doing  
11 business was in the Sixth Circuit.

12          QUESTION:  I see.

13          MR. BASKIN:  And that's why the decision was  
14 made --

15          QUESTION:  I'd like you to address, if I can go  
16 back to the -- what I think was the Chief Justice's  
17 question.  Your -- your basic point, I take it, assuming  
18 with you, as I will, for the moment that the language is  
19 ambiguous in Bill Johnson, is that we should treat or the  
20 statute should be interpreted as treating the antitrust  
21 statute and the labor statute a case brought by a  
22 defendant the same way.

23                   And obvious differences, which I'd like you to  
24 address, are that, one, there is a history in the labor  
25 law of employers using cases brought at law either to

1 break unions or to win disputes. And that was one of the  
2 reasons why the NLRA was passed. That had nothing to do  
3 with the antitrust laws. There is no such history.

4 Second, the employer -- the -- the matter is  
5 committed to an expert board in the labor area, which  
6 apparently believes that the way to enforce the labor law,  
7 unlike the antitrust law, is to say the sham exception  
8 exists before the case is decided, but once the case is  
9 decided, we're going to keep employers out of the courts  
10 by saying if they lose, that's the end of any immunity  
11 that they get. And we will now look to what their motive  
12 was in bringing this lawsuit. We have an expert board.  
13 We have a different history. We have different statutes.

14 MR. BASKIN: The --

15 QUESTION: And now, what is your response?

16 MR. BASKIN: The irony is that the Court  
17 considered those purported differences in the Bill  
18 Johnson's case and rejected them.

19 QUESTION: All right. Obviously -- look --

20 MR. BASKIN: No, no. I'm talking about the  
21 first part.

22 QUESTION: I -- but I'm trying to stay away from  
23 Bill Johnson because obviously if you're right that the  
24 statute holds it, I mean, I -- all right. Go ahead.  
25 Sorry. I didn't mean to interrupt.

1                   MR. BASKIN: Well, to me it's -- the interesting  
2 thing about this case is the Court has itself considered  
3 these very questions that you're raising and you have  
4 answered them, and you do not need to revisit them to --  
5 to come out with the conclusion that the NLRB has either  
6 misinterpreted the standard or that the standard is  
7 unworkable.

8                   QUESTION: Well, but I -- I have -- I have the  
9 same question that I think underlies Justice Breyer's  
10 concern. You would seem to give zero weight to the  
11 board's interest in stopping a purely retaliatory suit.  
12 The board says, now, you have organized this clerical unit  
13 and if -- if you persist in your union activity, we're  
14 going to sue you for the way you've been keeping our  
15 books. We're going to sue you for malpractice, blah,  
16 blah, blah, blah. And so long as there's any basis for  
17 the suit, they can do that in your -- or am I misstating  
18 your view?

19                   MR. BASKIN: Well, only in one respect. It has  
20 to have an objective basis. We are not here defending  
21 sham litigation, baseless litigation.

22                   QUESTION: Well, I suppose there's always abuse  
23 of process if there's -- but if there's some basis, then  
24 you can use it specifically to retaliate.

25                   MR. BASKIN: More than some. It must be

1 reasonable basis. And yes, yes.

2 QUESTION: You can specifically use it to  
3 retaliate.

4 MR. BASKIN: The Court -- this Court has said  
5 that if there is an objective basis, that means it's a  
6 meritorious lawsuit. Then there may also be a motivation  
7 of retaliation. Weighty, countervailing considerations.

8 QUESTION: But -- but we're talking -- we're  
9 talking in -- in the labor context.

10 MR. BASKIN: Yes.

11 QUESTION: And you lose the suit. So, there's  
12 -- you do not -- you're not the prevailing party in the  
13 suit. And you -- you lose on the merits. There's nothing  
14 the board can do about it if you've done it specifically  
15 to retaliate and for no other purpose.

16 MR. BASKIN: If it is a reasonable, meritorious  
17 suit, as this Court has defined it, where the right of  
18 access to a court is too important to be called an unfair  
19 labor practice solely on the ground that what is sought in  
20 the court is to enjoin employees from exercising a  
21 protected right because of the First Amendment to the  
22 Constitution, the right to petition the courts with a  
23 meritorious lawsuit.

24 QUESTION: But the First Amendment argument goes  
25 by the boards once the case is over.

1           MR. BASKIN: No, Your Honor, because -- for the  
2 same reasons that the Court held in Professional Real  
3 Estate. The employer has the right not to be second  
4 guessed with 20/20 hindsight as long as it had a  
5 reasonable basis for the suit.

6           QUESTION: Yes, but that ignores the fact that  
7 we're not concerned solely with chilling; we're also  
8 concerned with retaliation. And if we didn't have the  
9 retaliatory character of the lawsuit involved, I would  
10 think you would have a much stronger argument as you just  
11 made it. But the retaliation is there and I don't see how  
12 we can accept your -- in effect, your chilling argument  
13 without ignoring the retaliatory character.

14          MR. BASKIN: Because the employers are being  
15 chilled and, in effect, the retaliation --

16          QUESTION: Well, they're being chilled in -- in  
17 engaging in retaliation for the exercise of statutory  
18 rights.

19          MR. BASKIN: But there's actually less  
20 retaliation that's going to take place once the suit is  
21 completed. If that were the standard, then the board  
22 should be instructed to intervene sooner to keep the  
23 employees from having to spend more money to defend  
24 themselves.

25          QUESTION: And the -- the answer to that, it

1 seems to me, is set out in the cases. We've got a --  
2 we've got a federalism interest in letting the State  
3 courts at least adjudicate their cases. So, that's the  
4 answer to that objection.

5 MR. BASKIN: Well, here there's even a more  
6 compelling interest. You have two statutes, Federal  
7 statutes, that the employer was invited to file lawsuits  
8 under.

9 QUESTION: All right. Let's go back then to the  
10 -- to the difference between the two Federal statutes.  
11 The premise of Justice Breyer's question a moment ago  
12 accepted the ambiguity. If we are not that indulgent and  
13 if we read Bill Johnson's the way Justice Ginsburg read it  
14 -- and I will be candid to say I read it -- number one,  
15 the ambiguity does not leap out at us.

16 And number two, I'd like to go back to Justice  
17 Ginsburg's question. Even if we assume there was  
18 ambiguity at the beginning, we have had 20 years of board  
19 practice which seems to me to have dissipated any  
20 ambiguity. What's your response to that?

21 MR. BASKIN: Well, the ambiguity was in the  
22 opinion that led the board to take an erroneous view --

23 QUESTION: That's right I believe, and the board  
24 has made it very clear how the board is reading it, and  
25 after 20 years, we've got a pretty clearly settled body of

1 law, haven't we?

2 MR. BASKIN: Well, a settled body of erroneous  
3 law. And is that what the Court --

4 QUESTION: And we're interpreting statutes --  
5 the -- the settled body is clear and Congress is  
6 apparently quite agreeable to it.

7 MR. BASKIN: Well, first, the Court has said you  
8 don't defer -- that -- that you can't read anything into  
9 congressional inaction, particularly when it has taken  
10 this long before the board ruling really was definitive.  
11 And it has taken that long. The issue has been in doubt  
12 for most of that 20-year period.

13 But the -- going beyond that, the -- the  
14 board --

15 QUESTION: I don't understand that. Why do you  
16 say it's been in doubt for most of the 20-year period?

17 MR. BASKIN: Because it's been in doubt. Cases  
18 like this one have been taking a long time to wind their  
19 way through the process. At each step, the board said,  
20 well, we think that it -- there -- it was contested, as  
21 the board said --

22 QUESTION: You mean it has been contested  
23 constantly during that --

24 MR. BASKIN: Yes.

25 QUESTION: -- 20 -- 20-year period?

1 MR. BASKIN: Absolutely.

2 QUESTION: Has the board ever taken a different  
3 position in the 20-year period?

4 MR. BASKIN: There have been dissents, but no,  
5 the board has generally taken a consistent view.

6 QUESTION: So, the board's position has been  
7 clear for 20 years.

8 MR. BASKIN: Yes, but the board --

9 QUESTION: The board is slow. It may take the  
10 -- the cases may be in wending their way through.

11 MR. BASKIN: But the board is not entitled to  
12 deference in its interpretation of the U.S. Constitution  
13 or of this Court's decision. And that's all that we're  
14 talking about here is the board's interpretation of the  
15 Constitution and this Court's opinion. It's not  
16 interpreting the statute.

17 QUESTION: I think we're not raising -- I think  
18 Justice Ginsburg's question and my question is not so much  
19 geared to an issue of deference. We're -- we're trying to  
20 -- to get at the -- what seems to us the fact that the law  
21 has become settled. It may require no deference. It may  
22 have become settled because an administrative agency was  
23 interpreting what you think was an ambiguous opinion of  
24 this Court in the first place. But it seems to have  
25 become settled.

1           And there is a good reason, which underlies  
2 ultimately our -- our approach to stare decisis in  
3 statutory cases, for letting settled statutory  
4 understandings stayed settled unless the legislative  
5 branch wants to change them. And that's the argument  
6 we're getting at, not deference.

7           MR. BASKIN: Well, it is -- stare decisis is a  
8 form of deference, and we're talking about stare decisis  
9 would apply to the Court's own opinion. Only this Court  
10 is required to defer to itself about its own opinion.  
11 Your -- and so that's why we are talking about deference,  
12 I would submit. At least I interpret your question as  
13 asking should you stick with what the board has come up  
14 with. This Court has not ruled on --

15           QUESTION: I'm saying that --

16           MR. BASKIN: -- on Bill Johnson's since Bill  
17 Johnson's.

18           QUESTION: I'm saying that in -- as -- as your  
19 own answers indicate, for 20 years there seems to have  
20 been a -- a settled practice on the part of the board  
21 which at best is not inconsistent with our opinion. Why  
22 shouldn't we let a settled statutory regime stay settled  
23 unless the legislative branch wants to change it?

24           MR. BASKIN: I contest that it's a settled  
25 statutory regime, that we are dealing with a First

1 Amendment right, and that the board's outcome, which it  
2 has taken this long to reach back to the court, is wrong  
3 under the First Amendment. It has proved to be unworkable  
4 and it subjects employers to the impossible situation in  
5 future cases and in cases going on right now that they are  
6 expected to have 100 percent certainty of the outcome.

7 Indeed, the -- the board could, under this  
8 standard, say that you can win a jury verdict, go -- have  
9 it upheld by the district court, only to be reversed by an  
10 appeals court, and still be found under this Court's  
11 standard to be nonmeritorious and you lose. You have --  
12 you have violated the law.

13 QUESTION: If there's a retaliatory motive.

14 MR. BASKIN: If there's a retaliatory motive.  
15 And that's all it takes. There's a retaliatory motive.  
16 You go through all of that based on an attack on your  
17 businesses, which is why employers tend to file these  
18 lawsuits. They don't like lawyers that much, don't want  
19 to spend the money to do it, but they're under attack.  
20 BE&K was under attack in every conceivable forum.

21 QUESTION: But, I mean, that's a normal problem,  
22 isn't it, with the labor statutes and most other statutes.  
23 It forbids retaliatory behavior. Of course, you'll have  
24 cases where people make the wrong decision about it, where  
25 it's hard to predict, and so forth. But that's the

1 general situation.

2 MR. BASKIN: Well --

3 QUESTION: We're trying to carve out a -- an  
4 exception where you're home free from that.

5 MR. BASKIN: Well, no, it's the board that's  
6 carving out an exception from the basic First Amendment  
7 protection that this Court has recognized already.

8 QUESTION: Mr. Baskin, that -- that goes back  
9 every time to how you construe this paragraph, and so if  
10 the position that Justice White is making a distinction  
11 here between, on the one hand, an ongoing proceeding --  
12 the First Amendment says you can't stop it. Never mind  
13 deference to State courts. That's another consideration  
14 that weighs it to the same end, but traditionally under  
15 the First Amendment, a prior restraint, stop it, has been  
16 what the Court has looked at most cautiously. Then  
17 Justice White tells us, but it's different once the  
18 adjudication is over.

19 The -- the line between prior restraint and  
20 subsequent punishment goes all the way through First  
21 Amendment learning, and you treat this as, well,  
22 ambiguous, but if it were clear it's that there's any  
23 difference between stopping an ongoing proceeding and  
24 looking at a situation after it's been adjudicated?

25 MR. BASKIN: There -- there can be a difference,

1 mainly the difference of having more facts, having an  
2 outcome in front of the board at that point. And what the  
3 Court wanted to get across -- the issue in front of the  
4 Court in Bill Johnson's was don't interfere with an  
5 ongoing lawsuit. We don't know how it's going to turn  
6 out.

7 All right. Once it turns out, if it's without  
8 merit -- meritorious -- I'd just invite the Court to look  
9 at each use of the word meritorious in the Bill Johnson's  
10 opinion. You will regrettably find some inconsistencies  
11 not only internally but with other opinions of this Court  
12 both before Bill Johnson's and after. You have the  
13 opportunity to clarify the law now in a way that is very  
14 straightforward under the Professional Real Estate  
15 Investors test.

16 If there are no other questions, I'd like to  
17 reserve the remainder of my time for rebuttal.

18 QUESTION: Very well, Mr. Baskin.

19 Mr. Wallace, we'll hear from you.

20 ORAL ARGUMENT OF LAWRENCE G. WALLACE

21 ON BEHALF OF THE RESPONDENTS

22 MR. WALLACE: Thank you, Mr. Chief Justice, and  
23 may it please the Court:

24 The board and the courts of appeals have had no  
25 difficulty in reading Bill Johnson's the way I think most

1 people would read this Court's opinion as comprehensively  
2 addressing what the board was doing with respect to the  
3 unfair labor practice under section 8(a)(1) of the filing  
4 of --

5 QUESTION: Mr. Wallace.

6 MR. WALLACE: -- retaliatory lawsuits.

7 QUESTION: Mr. Wallace, when I ask you a  
8 question, please stop.

9 MR. WALLACE: I didn't hear you. I'm sorry.

10 QUESTION: Well, listen a little more closely.  
11 Do you disagree with Mr. Baskin's contention  
12 that the word meritorious is used inconsistently in the  
13 part of Bill Johnson's that we're talking about?

14 MR. WALLACE: I do disagree with that, and --  
15 and no court of appeals that has reviewed board decisions  
16 since Bill Johnson's has read it that way. The Court  
17 quite clearly distinguished between enjoining ongoing  
18 lawsuits, which it said could be done only if the lawsuit  
19 was baseless. Otherwise, the board has to wait until the  
20 lawsuit has been resolved. If the lawsuit turned out  
21 favorably to the employer, then it could not be an unfair  
22 labor practice. But if the lawsuit turned out to be  
23 unmeritorious, if the employer lost, then the board could  
24 consider whether it was filed for a retaliatory purpose.

25 QUESTION: It did say that, but of course, that

1 was not the situation before the Court. I mean, it -- it  
2 may be the clearest dictum in the world. It may be the  
3 dictum closest to a holding possible, but it is still  
4 dictum. The Court did not have before it a case in which  
5 the employer had already brought the suit and had lost.  
6 Now, you know, it said what would happen in that  
7 situation, and you know, I think that's entitled to some  
8 weight. But the issue that your opponent wants to argue  
9 here is whether the Court was wrong to say that.

10 MR. WALLACE: I beg to differ. The Court  
11 specifically noted that some of the claims of the employer  
12 had already been dismissed in the State courts, and in  
13 footnote 15, at the end of the -- its opinion, it said the  
14 board, therefore, can use the criteria we --

15 QUESTION: But those cases were not before them.  
16 It said what the board can do in those cases that are not  
17 now before us. As I say, it may be a dictum that is the  
18 very next thing to a holding, but it is not a holding.  
19 Those were not cases that the Court had in front of it.

20 MR. WALLACE: It -- it was a direction for how  
21 further proceedings in the case should be handled.

22 QUESTION: Exactly, as many dicta are. As many  
23 dicta are, and we do not always observe those directions  
24 when we -- when we have the opportunity to examine the  
25 matter in a -- in a more immediate context.

1           MR. WALLACE: In any event, if I may turn now to  
2 address the question that the Court asked the parties to  
3 address in formulating the question presented here. Our  
4 submission in this case is that this Court's holding in  
5 Professional Real Estate Investors interpreting the  
6 antitrust laws and the Court's decision in Bill Johnson's,  
7 including this -- these dicta to govern further  
8 proceedings interpreting the National Labor Relations Act,  
9 are entirely compatible with one another in light of the  
10 important differences in the purposes, processes,  
11 remedies, and practicalities of enforcement that were  
12 implicated in the two statutory schemes at issue.

13           QUESTION: Well, I -- I have one particular  
14 difference in mind that I'd like you to comment on. I --  
15 I -- it's -- it seems to me that what is sought to be done  
16 here is much worse as far as the independence of the  
17 courts and the guarantee of access to the courts by -- by  
18 the citizenry is concerned than what was sought to be done  
19 in -- in -- what case -- Professional Real Estate.

20           And this is the difference. In Professional  
21 Real Estate, it would have been the courts that would have  
22 decided the facts which would have imposed upon the losing  
23 party attorney's fees. In this situation, it is going to  
24 be the Labor Board that will decide the factual question  
25 of whether there was a retaliatory motive, and the courts

1 will have to defer to that factual finding if there is a  
2 basis in the record, whether the courts agree with it or  
3 not.

4 I find it quite offensive to think that Article  
5 III courts are going to be told that certain people who  
6 have come to them for relief will pay a penalty for doing  
7 so on the basis of a retaliatory motive found not by  
8 Article III courts at all but by the labor court -- but by  
9 the Labor Board. In that respect, this case is much worse  
10 than -- than what was going on in -- in Professional Real  
11 Estate.

12 MR. WALLACE: Well, the board is not  
13 contradicting anything found by the courts. The question  
14 of retaliatory motive was not at issue in the underlying  
15 litigation, and the board has to wait under this Court's  
16 decision in Bill Johnson's before it addresses the  
17 question of whether there's been an unfair labor  
18 practice --

19 QUESTION: They will address it in a proceeding  
20 before the board. They will find an unfair labor practice  
21 on the basis of their finding of a retaliatory motive.

22 And I -- I note, by the way, as to, you know,  
23 how -- how much we can trust those -- those findings -- I  
24 had one of my law clerks look up how many -- how many  
25 times the board has imposed this kind of an unfair labor

1 practice penalty for -- for bringing a lawsuit. Since the  
2 Power Systems case in '78, which is when they started this  
3 process, they have 26 decisions ordering the employer to  
4 pay attorney's fees incurred in defending a lawsuit and 3  
5 decisions in which it -- it ordered a union to do so.  
6 Now, is -- is there some reason that unions are not using  
7 lawyers as much as companies are these days?

8 MR. WALLACE: Well, the -- the cases against  
9 unions are much less numerous to begin with because unions  
10 are less apt to bring lawsuits to interfere with the  
11 rights of employees under section 7 for concerted  
12 activity. We're talking about a retaliation against  
13 section 7 rights. Usually that's been the subject of  
14 employer suits, but the board does apply the same test  
15 when --

16 QUESTION: There were union lawsuits in this  
17 present case, weren't there? Plenty of them.

18 MR. WALLACE: But those were against the  
19 employer, and -- and they --

20 QUESTION: But suits -- suits against the  
21 employer can certainly be brought to impair the -- the  
22 rights of the employees not to -- not to unionize.

23 MR. WALLACE: That would have to be a showing a  
24 violation by the union of 8(b)(4), not -- not that the  
25 lawsuit was an 8(a)(1) violation against the concerted

1 activities rights of employees. The employer would have  
2 to show that the union lawsuit violated duties that the  
3 union owes, and that was resolved against the employer on  
4 the merits in this case because the -- the subject of the  
5 lawsuits was about working conditions at the site of  
6 employment, which was a legitimate union concern.

7 QUESTION: Never -- never mind the 26 to 3.  
8 Just -- just tell me why I -- as -- as an Article III  
9 judge, I should not be concerned about leaving it to a  
10 Federal agency to make the factual finding that will  
11 determine whether somebody will be punished for bringing a  
12 reasonable lawsuit, although one which ultimately loses in  
13 Federal courts. Why shouldn't I be concerned about that?

14 MR. WALLACE: Well, this isn't punishment. It's  
15 make-whole relief under an administrative scheme which is  
16 meant to protect employees in the exercise of their  
17 concerted rights, and it involves no contradiction of any  
18 issue that was before the -- the court in the underlying  
19 litigation which did not have occasion to address whether  
20 the suit was brought for a retaliatory purpose.

21 QUESTION: Mr. Wallace, Mr. Baskin told us that  
22 there are punitive aspects to this that could lead to  
23 debarment he said. So, it's not simply to provide for  
24 fee-shifting, but that there are heavy consequences.

25 MR. WALLACE: Well, the -- the case to which the

1 Chief Justice referred earlier, Wisconsin Department of  
2 Industrial Relations against Gould, was one in which this  
3 Court held that Wisconsin law was preempted, and Wisconsin  
4 could not refuse to make purchases, State purchases, from  
5 companies that had been found to have violated the  
6 National Labor Relations Act because the whole purpose of  
7 the remedy scheme under the National Labor Relations Act  
8 is remedial and the remedies are limited, and the idea is  
9 to get labor disputes behind us, not to have disruptions  
10 of the economy, to keep productivity going, and to keep  
11 the people employed.

12 QUESTION: Well, is -- is the point of this  
13 colloquy whether or not this act can be called punitive or  
14 this NLRB doctrine can be called punitive? I -- I had  
15 thought you said that it is punitive, or am I wrong?  
16 Maybe you think nothing -- maybe you think nothing turns  
17 on that.

18 MR. WALLACE: Well, I -- I wouldn't think that  
19 -- that anything would turn on it, but it is not punitive.  
20 The only remedy that's granted is a make-whole remedy that  
21 the costs incurred by the prevailing defendants in a suit  
22 brought for an improper motive, namely to coerce those  
23 defendants in the exercise of rights granted them by  
24 Federal statute when suit turned out --

25 QUESTION: But is there any other effect by

1 virtue of the finding of the unfair labor practice?

2 MR. WALLACE: Well --

3 QUESTION: I mean, true in terms of money, it's  
4 the fees. Is there any other effect --

5 QUESTION: -- by virtue of their finding?

6 MR. WALLACE: Notice is to be posted. The cease  
7 and desist order issues. Those -- those parts of the  
8 remedy were not challenged in this case.

9 QUESTION: Well, let's just talk about the make-  
10 whole remedy. We held in 1982 that in a private suit for  
11 an unfair labor practice, which provides for making whole  
12 the -- the plaintiff for -- for his damages, there was no  
13 authority in the court to award attorney's fees, that  
14 making whole there did not include attorney's fees. What  
15 -- and -- and, you know, the language was very clear about  
16 the American rule and what a -- what a change it would be.  
17 Why -- why should it be any different when the unfair  
18 labor practice is -- is decreed by the board rather than  
19 in a private action?

20 It doesn't say explicitly that you can get  
21 attorney's fees, just as -- just as the other -- the --  
22 the private action provision didn't say explicitly. It  
23 just said, you know, whatever damages you have. And  
24 damages were not intended to include that. Why should we  
25 hold any differently in this situation, especially when

1 the result is to leave it to the board to decide whether  
2 -- whether somebody will be punished for bringing a  
3 meritorious but ultimately unsuccessful suit in Federal  
4 court?

5 MR. WALLACE: Well, board proceedings are much  
6 less burdensome than -- than court proceedings to those  
7 that are issue, and the Court held in Bill Johnson's that  
8 the board remedy of recompensing the defendants who  
9 prevailed in this suit for their costs, because the suit  
10 was brought to defeat their section 7 rights, was a  
11 permissible remedy by the board.

12 QUESTION: We held it or -- or said it. I mean,  
13 that -- that's one of the disputes here, isn't it?

14 MR. WALLACE: Yes. They held it in the sense of  
15 -- of prescribing that rule for the further proceedings to  
16 be held in that very case on remand from the Court's  
17 order.

18 QUESTION: We're just going around the dictum  
19 point again. I consider it dictum, and -- and the issue  
20 is whether that was a wise thing to say.

21 MR. WALLACE: Well, when the Court prescribes a  
22 rule of that nature, the United States considers itself  
23 bound by it in its further handling --

24 QUESTION: Yes. I'm -- I'm not criticizing you  
25 for arguing the point, certainly not.

1           QUESTION: Mr. Wallace, I -- do you agree that  
2 under the board's rule here that it does allow the board  
3 to find the unfair labor practice and impose the sanctions  
4 on litigation brought by employers that is not limited to  
5 just shams and abuse of process?

6           MR. WALLACE: That's --

7           QUESTION: It does allow the imposition of these  
8 things for an employer suit that could be considered  
9 objectively reasonable at the time it was brought.

10          MR. WALLACE: Exactly so. That -- I thought the  
11 Court made it quite clear in Bill Johnson's that as long  
12 as the suit was an unmeritorious one, in the sense that it  
13 did not prevail, the board could afford the limited remedy  
14 that's available under the act.

15          QUESTION: Well, does that have the necessary  
16 effect of at least chilling some conduct that is protected  
17 by the First Amendment? I mean, it seems to me it does.  
18 You have to -- you would have to concede that it does.

19          MR. WALLACE: But it -- it's a far less daunting  
20 situation than what the Court was faced with under the  
21 antitrust laws in the Professional Real Estate Investors  
22 case.

23          QUESTION: Mr. Wallace, isn't it correct that  
24 the scope of chilling is limited to those with a  
25 retaliatory motive?

1 MR. WALLACE: Absolutely.

2 QUESTION: I thought it's where the board  
3 finds --

4 QUESTION: -- already chilled those cases.

5 QUESTION: -- to those where the board and not  
6 Federal courts on their own find a retaliatory motive.

7 MR. WALLACE: But, of course, the board's  
8 findings are subject to judicial review.

9 QUESTION: For -- so long as there's substantial  
10 evidence, which means -- you know.

11 MR. WALLACE: Correct.

12 QUESTION: All right. So --

13 QUESTION: In every 8(a)(1) case, the  
14 retaliatory motive is found by the board. That's part of  
15 the statutory proceeding, isn't it?

16 MR. WALLACE: That is correct.

17 QUESTION: The other parts of this statutory  
18 proceeding do not exclude the Federal courts from their  
19 business, do they, which this does by imposing penalties  
20 upon people who come to the Federal courts?

21 MR. WALLACE: Well, I think this Court's make it  
22 quite -- this Court's decisions make it quite clear that  
23 under the National Labor Relations Act, it is board rather  
24 than courts that have the responsibility of ruling about  
25 unfair labor practices.

1           QUESTION: We agree with that and the only issue  
2 is whether that statutory provision places within the  
3 board the power to impose this particular sanction for an  
4 unfair labor practice, a penalty for bringing a  
5 meritorious lawsuit.

6           MR. WALLACE: Well, make-whole relief --

7           QUESTION: Isn't the make-whole relief simply  
8 that they've said, since ours is a statute which foresees  
9 taking labor disputes out of the courts and putting them  
10 into the board, since that's why it was passed, we're  
11 going to say a -- a loser in a Federal lawsuit that  
12 violates that basic underlying purpose has to pay  
13 attorney's fees to the winner? Now, is there anything  
14 here other than that?

15          MR. WALLACE: Not -- not at all. That's -- that  
16 is what is at issue, and the -- the National Labor  
17 Relations Act authorizes the board, under this Court's  
18 opinion in Bill Johnson's, to afford that kind of a  
19 limited remedy --

20          QUESTION: Well, isn't what --

21          QUESTION: Is the courts' -- is the board's  
22 definition of a unmeritorious lawsuit simply one which --  
23 in which the plaintiff does not get what the plaintiff  
24 wants. It's thrown out of court, so to speak.

25          MR. WALLACE: That's approximately it, yes, Mr.

1 Chief Justice.

2 QUESTION: How -- how would it vary? Why do you  
3 use the term approximately?

4 MR. WALLACE: Well, there can -- there can be  
5 cases in which a voluntary dismissal was taken with  
6 prejudice. Sometimes the question of whether it was an  
7 unmeritorious suit becomes a debatable question. But  
8 ordinarily it's one, as it was in this case, in which the  
9 courts have ruled against claims that the employer made.

10 QUESTION: Is -- is -- I'm sorry. Is there any  
11 authority? I mean, I thought, as a matter of proposition,  
12 maybe there would be some authority like a -- an  
13 electricity generating regulator would have said in  
14 certain kinds of lawsuits, you have to have fee-shifting.  
15 The SEC might say in certain kinds of lawsuits, certain  
16 companies have to pay attorney's fees. The barbers'  
17 regulator might say in certain union -- or certain --  
18 certain instances the barbers have to pay the legal fees  
19 of somebody else. Is -- is there any comparable authority  
20 any other place that you've found?

21 It -- it doesn't seem to me an absurd  
22 proposition of law or of constitutional law that a  
23 regulator who's in charge of a particular group of  
24 individuals or businesses says in particular circumstances  
25 there will be fee-shifting. But maybe that's total --

1 maybe this is the only case that's ever come up.

2 MR. WALLACE: Well, we -- we didn't come up with  
3 analogies in which regulatory agencies do the fee-  
4 shifting. There are certainly many statutes that provide  
5 for fee-shifting. The Fogerty case discusses a number of  
6 them.

7 QUESTION: But they have to be very explicit  
8 because it's such an extraordinary thing. That's what our  
9 jurisprudence very clearly says. And here with -- with no  
10 more explicitness than there was in the case in Summit  
11 Valley, the -- the agency is assuming the power to fee-  
12 shift and to make the factual determination upon which the  
13 fee-shifting turns. I think that's extraordinary.

14 MR. WALLACE: Well, there is not a reference to  
15 fee-shifting as such in the National Labor Relations Act,  
16 but Congress did say in section 8(a)(1) that it shall be  
17 an unfair labor practice to an employee to interfere with,  
18 restrain, or coerce employees in the exercise of the  
19 concerted activity rights for mutual aid and protection  
20 that are guaranteed in section 7. And this Court in Bill  
21 Johnson's recognized that there had been a history of the  
22 use of the courts for that purpose.

23 QUESTION: Mr. Wallace --

24 QUESTION: In -- in a case like this, if we have  
25 essentially these facts, if the finding of the board was

1 is that the purpose of the employer in bringing the suit  
2 was because the employer's board of directors met and they  
3 say, we are being hurt in the marketplace, public opinion  
4 is against us, we must bring these suits to protect our  
5 position in the business community, I take it that is a  
6 retaliatory motive.

7 MR. WALLACE: Well, the retaliatory motive would  
8 be -- it would have to be shown that the suit was brought  
9 for the purpose of coercing, discouraging, suppressing,  
10 restraining the employees in the exercise of their rights.

11 QUESTION: Well, but you -- you know what I'm  
12 trying -- trying to get at. The -- the union is doing  
13 these to weaken the employer and the employer meets and  
14 says, this is hurting our business, it's hurting us in the  
15 marketplace. Is that retaliatory?

16 MR. WALLACE: Well, the -- the board addresses  
17 that question in light of all the circumstances of the  
18 case. To the extent that the suit was not baseless in law  
19 or fact that the employer brought --

20 QUESTION: Assume -- assume that there -- it's  
21 not baseless.

22 MR. WALLACE: That weighs in the employer's  
23 favor. There are other factors that weigh against the  
24 employer. In this --

25 QUESTION: But it can be retaliatory for the

1 employer to protect its business against suits by the  
2 union which are brought by the union for the motive of  
3 weakening the employer. That's retaliatory.

4 MR. WALLACE: Well, only if the employer has  
5 brought suits against the union or the employees. It  
6 certainly can defend against any suit --

7 QUESTION: No. It's been bringing suits in  
8 order to stop the other suits.

9 MR. WALLACE: Well --

10 QUESTION: Let -- let me ask you in a related  
11 vein. Maybe it's an unrelated vein. Can -- could  
12 Congress overrule Noerr-Pennington?

13 MR. WALLACE: This Court did not indicate in any  
14 way that it could not reexamine, modify the rules of  
15 Noerr-Pennington or of Professional Real Estate. The  
16 Court --

17 QUESTION: In other words, Noerr-Pennington  
18 doesn't have a constitutional underpinning.

19 MR. WALLACE: It -- it certainly construed the  
20 antitrust laws in light of the fact that those laws focus  
21 mostly on private conduct in the marketplace, not on  
22 petitioning for Government-imposed restraints, and that  
23 there was a need in construing them not to -- to allow  
24 improper chilling of the bringing of lawsuits or other  
25 forms of petitioning activity.

1                   And in -- in Professional Real Estate itself,  
2                   the procedural posture focused on the need for summary  
3                   judgment to be available against a counterclaim for treble  
4                   damages under the antitrust laws in circumstances in which  
5                   the counterclaimant, after the underlying copyright  
6                   infringement suit was found to be objectively reasonable,  
7                   was saying, but I still need further discovery in order to  
8                   ascertain the intent and motives of the original plaintiff  
9                   in bringing the copyright infringement suit because it's  
10                  my view that -- that they didn't really expect to prevail  
11                  and that they were bringing it for anticompetitive  
12                  purposes.

13                  And the danger that the Court was addressing  
14                  there was that much of the protective quality of the Noerr  
15                  doctrine itself could be undermined if the original  
16                  lawsuit that supposedly is protected could be chilled by  
17                  the prospect of burdensome discovery and treble damages.

18                  QUESTION: My -- my concern -- my concern is --  
19                  is this, is that the First Amendment has its own  
20                  corrective counterspeech, but what the board has done here  
21                  is it's defined retaliatory motive so broadly that it's  
22                  taken away that First Amendment corrective. And that is  
23                  itself a distortion of First Amendment principles which  
24                  allowed the unions to bring these suits in the first  
25                  place, it seems to me.

1           MR. WALLACE: Well, there -- there is a very  
2 limited remedy available here compared to the prospect  
3 that treble damages might be awarded on the basis of  
4 rather unpredictable findings about subjective motivation  
5 in bringing the lawsuit. And it -- it -- it's a remedy  
6 that's been applied against a background of what this  
7 Court in Bill Johnson's referred to as a -- a powerful  
8 tool. Powerful was the word the Court used.

9           QUESTION: Mr. Wallace, is retaliatory motive --  
10 is that before us in this case? I mean, it may be that  
11 this Court, by saying that the board -- that there was,  
12 even in this case, insufficient evidence of retaliatory  
13 motive, but I didn't think that was the question presented  
14 here.

15           MR. WALLACE: I agree with you on that point,  
16 Justice Ginsburg.

17           QUESTION: Because on that, I was going to ask  
18 you, well, what is it that shows that this was in  
19 retaliation for violation of section 7 rights instead of  
20 being in -- in response to the union's desire simply to  
21 harass the employer? I think that there are very serious  
22 questions about that, but my view was of this case that --  
23 that wasn't before us.

24           MR. WALLACE: I -- I agree with you completely.  
25 In fact --

1           QUESTION: I take it -- I take it the background  
2 of this case is that there was a finding of retaliatory  
3 motive and we have to make our decision based upon the way  
4 the board interprets retaliatory motive in cases such as  
5 this.

6           MR. WALLACE: Well, it's certainly part of the  
7 background of the case, but the Court did limit the grant  
8 of certiorari to whether these two decisions are  
9 compatible given the differences between the two acts.

10          QUESTION: And we have to defer both to the  
11 board's determination of what constitutes a retaliatory  
12 motive and, even more so, to the board's factual  
13 determination that retaliatory motive existed. All it  
14 takes is one witness who says it existed, and that would  
15 constitute substantial evidence. And if the board goes  
16 with that witness, the courts have to effectively penalize  
17 the company for seeking resort in the courts.

18          MR. WALLACE: Well, there is seldom direct  
19 evidence of that kind, although occasionally there is  
20 direct evidence of animus in the bringing of the suit.  
21 But the board has relied on a number of factors, which  
22 we've set out on page 47 of our brief, in various -- in  
23 various cases in seeing retaliatory motive. In this case  
24 one of the more persuasive ones was that the lawsuit was  
25 brought against parties that the plaintiff knew or should

1 have known did not participate in the allegedly unlawful  
2 conduct. They included as defendants unions that had  
3 not --

4 QUESTION: That's an issue that was raised by  
5 question 3 of the cert petition, and we didn't grant it.

6 MR. WALLACE: That's correct. That's correct.  
7 The -- the petition --

8 QUESTION: But -- but --

9 MR. WALLACE: -- was about the compatibility of  
10 the Court's decision in Professional Real Estate with what  
11 we had taken to be the Court's clear prescription of the  
12 limits on the remedy of the 8(a)(1) and unfair labor  
13 practice in the Bill Johnson's case.

14 QUESTION: Mr. Wallace, we are concerned with  
15 the Bill Johnson's case, and a question has been raised  
16 about where does the authority to come -- come from for  
17 this fee-shifting. It does appear in the Court's opinion  
18 in Bill Johnson's. If a violation is found, the board may  
19 order the employer to reimburse the employees, whom he has  
20 wrongfully sued, for their attorney's fees. Where did the  
21 Court come up with that fee-shifting? Was that something  
22 that the board had been doing? Did the Government propose  
23 it? But it's right there in the Court's of opinion that  
24 the proper remedy is fee-shifting.

25 MR. WALLACE: Precisely so. But the board had

1 been doing it regardless of the merits of the underlying  
2 lawsuit. The board had become so concerned with the use  
3 of the courts for retaliatory litigation that whether the  
4 lawsuit was meritorious or not, if it found that it was  
5 brought for the purpose of defeating section 7 rights, it  
6 was awarding fees. And the Court said, no, wait a minute.  
7 You can't do that and you can't enjoin lawsuits that are  
8 not baseless. The Court was really correcting the board  
9 and reining in that remedy in a way that the board has  
10 complied with.

11 QUESTION: Thank you, Mr. Wallace.

12 Mr. Baskin, you have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF MAURICE BASKIN

14 ON BEHALF OF THE PETITIONER

15 MR. BASKIN: Thank you, Your Honor. I would  
16 just briefly like to address the question of retaliatory  
17 motive, but only as I understood the Justices' questions  
18 to be does it suffice alone so that they -- the board can  
19 rightly ignore the question of the objective basis. And  
20 -- and the reason it does not suffice, among others, is  
21 perhaps looking at the 26 decisions Justice Scalia found,  
22 there's only one among them where there was no finding of  
23 retaliatory motive and there only because it was found  
24 that the action didn't relate in any way to the union  
25 activity.

1 QUESTION: There was only one -- one where what?

2 MR. BASKIN: Where there was no finding, where  
3 the board found no retaliatory motive. It found against  
4 the employers 25 out of 26 times. Once it found that the  
5 employer had lost the lawsuit, automatically according to  
6 the board, no merit. Even though they had all the best  
7 circumstances leading up to the loss, they lost. No  
8 merit.

9 Then the board proceeds to the retaliatory  
10 motive step supposedly going to protect employers, and all  
11 they say is does it relate to union activity. Well, if it  
12 relates, except for one case where it didn't, boom, you  
13 lose. The employers lose.

14 And what the result of that is, is that no  
15 employer can go to court if any sort of protected activity  
16 is even arguably involved because even if you convene a  
17 panel of experts, as BE&K did in this case, and go as far  
18 as you can to make sure you are not trampling on any  
19 employee rights, if you go to court, you will be found to  
20 have violated the law unless you can say with 100 percent  
21 certainty that you're going to win. And no one can say  
22 that.

23 QUESTION: I didn't know -- as long as you're  
24 finished, I thought the 26 cases were 26 cases in which  
25 they awarded attorney's fees.

1 MR. BASKIN: No. 26 cases with attorney's fees  
2 plus, attorney's fees --

3 QUESTION: All right. Now, I thought they  
4 weren't supposed to award attorney's fees or anything  
5 unless there was a retaliatory motive.

6 MR. BASKIN: Yes. The board found retaliatory  
7 motive.

8 QUESTION: All right. No, but I mean, of course  
9 they did. I mean, how many cases where there where people  
10 alleged retaliatory motive and they found the opposite?

11 MR. BASKIN: In the 26 cases --

12 QUESTION: No. Those are the ones where they  
13 won. How many did they lose? I mean, I don't understand  
14 this 26 case business. I thought the 26 cases were the  
15 ones that they awarded it in, and I thought they were only  
16 supposed to award it where it's retaliatory. So, it's  
17 hardly surprising it's retaliatory.

18 MR. BASKIN: No. As I understood Justice  
19 Scalia, and frankly our own research, is these are 26  
20 cases that reached the board where the board could have  
21 gone either way, and every time, except for the one, they  
22 found no merit and retaliatory motive. And they did so  
23 almost automatically because of their misreading of a  
24 principle. We say a misreading. But either way, it's a  
25 bad principle.

1           QUESTION: Well, when you say the board could  
2 have gone either way, you don't mean that you know the  
3 evidence and that, in fact, on the evidence, the board  
4 could have gone either way. You simply mean that it's a  
5 case in which if the evidence showed there was  
6 retaliation, they could award the fees, and if the  
7 evidence did not show retaliation, they couldn't award the  
8 fees. Right?

9           MR. BASKIN: The 26 cases are --

10          QUESTION: So, all we know is that in those  
11 cases, they found retaliatory motive. We don't know that  
12 they're wrong.

13          MR. BASKIN: Yes, that's -- that's what we know.  
14 They found retaliatory motive. And the limited point that  
15 I'm making here at the end is that this retaliatory motive  
16 idea is no more -- not enough protection under the NLRA  
17 just as it is not enough protection -- and you've already  
18 found it to be not enough protection -- under the  
19 antitrust laws. And that's why the Professional Real  
20 Estate standard is the correct standard and it's the only  
21 one that protects employers' rights under the First  
22 Amendment.

23          Thank you.

24          CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baskin.  
25          The case is submitted.

1                   (Whereupon, at 12:08 p.m., the case in the  
2 above-entitled matter was submitted.)

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